

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,
4 Plaintiff,

5 vs. CRIMINAL NO. CR-08-1669 JB
6 RICHARD ANTHONY MCKENZIE,
7 Defendant.

8 Transcript of Motions Hearing before The Honorable
9 James O. Browning, United States District Judge, held in
10 Albuquerque, Bernalillo County, New Mexico, commencing on
11 Wednesday, December 1, 2010, at 9:05 a.m. and concluding at
12 11:23 a.m. Proceedings recorded by mechanical stenography;
13 transcript produced by computer-aided-transcription.

14 For the United States:

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17 BY: MR. DAMON P. MARTINEZ

18 For the Defendant:

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21 Also Present: Mr. Mark Hyland

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1 THE COURT: Good morning, everyone. I appreciate
2 everyone making themselves available to me this morning.

3 All right. The Court will call United States of
4 America versus Richard McKenzie, Criminal Matter 08-1669 JB.

5 If counsel will enter their appearances.

6 MR. MARTINEZ: Damon Martinez on behalf of the United
7 States, Your Honor.

8 THE COURT: Mr. Martinez, good morning to you.

9 MR. COOPER: Good morning, Your Honor. Robert Cooper
10 on behalf of Mr. McKenzie. Mr. McKenzie is present in the
11 courtroom today.

12 THE COURT: Mr. Cooper, good morning to you.

13 Mr. McKenzie, good morning to you.

14 THE DEFENDANT: Good morning, Your Honor.

15 THE COURT: All right. We're here on the portion of
16 the motion that Mr. McKenzie filed back in May, which was
17 partially to continue the trial setting, and then I think we
18 had a change of counsel, but we're here now on his request for
19 a Franks hearing and a request to reopen the suppression
20 hearing.

21 Mr. Cooper, it's your motion. If you wish to speak
22 in support of it.

23 MR. COOPER: Thank you, Your Honor.

24 Judge, today what I would do is I would like to call
25 Carlos Herrera, an investigator with the federal defender's

1 office, today. Mr. Herrera went out to Flagstaff, he
2 interviewed the ticket agent, and I would like to put on some
3 testimony concerning what the ticket agent may have told
4 Mr. Herrera. I would also like to put Agent Hyland on the
5 stand today to talk about what he previously had told this
6 Court, and then I would argue to the Court that what --
7 together what we learned from the ticket agent and from Agent
8 Hyland is sufficient to allow you to reopen the suppression
9 hearing to determine whether or not the information that comes
10 forth -- or whether or not there's sufficient information that
11 we have brought forth to actually have a Franks hearing, to set
12 that up, let us then subpoena [REDACTED], the ticket agent,
13 Agent Hyland, and also perhaps John Claiborne, a task force
14 officer, at this motion hearing on a Franks hearing to give you
15 further testimony concerning whether or not the factors that
16 you considered would change given this new testimony.

17 So that's, I think, Your Honor, where I will -- I
18 believe we are today.

19 THE COURT: Well, it seems to me that we may have an
20 issue as to Mr. Hyland, but as far as Mr. Herrera, I think
21 that's part of your motion, to put him on and let me hear that
22 testimony, so at least that aspect I think was part of the
23 motion.

24 Do you see any problem with Mr. Herrera testifying,
25 Mr. Martinez?

1 MR. MARTINEZ: Yes, Your Honor. The United States
2 objects to that testimony.

3 THE COURT: What if Mr. Herrera had done an affidavit
4 here, which I would have almost expected? How would that have
5 been different? I mean, I understand Mr. Hyland may raise a
6 different issue for you, but Mr. Herrera, if he had done an
7 affidavit, I'd have his testimony in front of me.

8 MR. MARTINEZ: Your Honor, the way that that would be
9 different is as already referenced in the record to date. The
10 position of the United States is that this defendant has been
11 allowed to go beyond setting the foundation to the extent of
12 being able to identify who they believe to be the confidential
13 informant, and according to Roviario, which the Court has
14 already cited in its pleadings -- or in its opinion, the United
15 States is entitled to keep a confidential informant's identity
16 confidential because of the public policy and aspects behind
17 that, and that has not -- if defendant is correct in
18 identifying this individual, that has not occurred in this case
19 and the extent or the effect of that identification could have
20 repercussions not only in this matter, but in future matters.

21 Now, what has already occurred this morning is that
22 defense counsel has named a specific individual who they want
23 to bring before this Court to testify as the cooperating
24 individual, Your Honor. What that does is that puts -- and I
25 don't use this term lightly, but a chilling effect upon the

1 issue of the confidential informant.

2 Now, the issue before this Court has been a Fourth
3 Amendment issue, and this Court, in its opinion, had to
4 determine whether the initial encounter between Agent Hyland
5 and the defendant was an investigative stop or a consensual
6 encounter, and the Court has quite clearly ruled that this was
7 a consensual encounter. Because of that ruling the Fourth
8 Amendment issue is not in play anymore, so any testimony by
9 this individual is irrelevant and immaterial to the issue that
10 was brought before this Court for suppression.

11 Your Honor, as the Court has already determined, the
12 confidential informant in this case was a tipster. He did not
13 have -- He was not an active participant in this matter.

14 So getting back to your original question, why is
15 that testimony different today as opposed to just an affidavit?
16 The testimony is different because of the possible
17 ramifications that could occur through the testimony, through
18 all the information that could be let out, and at this point.
19 Obviously, this is in a public forum, this is a public record
20 right now, but I would ask that the reference to the name given
21 by defense counsel be stricken from the record, and an
22 affidavit is more of a way to keep information concerning a
23 possible confidential informant more secure and -- more secure
24 from public eyes and keep the identity of the individual more
25 safe and keep the individual from being harassed or

1 specifically targeted. And I would say that that's in accord
2 with the public policy pursuant to Roviario, which is U.S. 35 --
3 I'm sorry -- 353 U.S. 53, Your Honor.

4 Your Honor, may I also, while I'm up here --
5 Actually, I have a housekeeping matter, too, that I'd like to
6 correct from what I filed, but I want to keep that separate
7 from what the Court's hearing now. I can go into it now or
8 later.

9 THE COURT: It's up to you. Let's take it up later,
10 if it doesn't matter to you. Let me deal with this.

11 Mr. Cooper, would you have any problem, at the
12 present time, if Ms. Schutte Everett, the court reporter, were
13 to redact the name that you mentioned, or is that essential to
14 your presentation this morning?

15 MR. COOPER: Your Honor, I'd have no objection to
16 that. I think that's fair.

17 THE COURT: All right. I'll just have her, if this
18 is all right with you, indicate that you're redacting the name
19 at that point. So we will redact the name that was mentioned.

20 MR. MARTINEZ: Thank you, Your Honor.

21 THE COURT: I think what I'm going to do at this
22 point, Mr. Cooper, is I am going to hear from Mr. Herrera, and
23 if it's not important to your presentation here, if you could
24 maybe have him discuss these facts without mentioning the name,
25 and then we'll see where we go after that. I may -- I may

1 pause after that before I hear Mr. Hyland, depending on what
2 Mr. Martinez wants to do, but I think I will hear Mr. Herrera,
3 because I think you could have done an affidavit and it would
4 be the same testimony, so I think I can hear that.

5 Mr. Martinez.

6 MR. MARTINEZ: Your Honor, I would just continue my
7 objection, because I believe, based on the facts, just like the
8 previous hearing in this matter, by -- with anticipated
9 questions being, Where did you speak to this individual, where
10 was this person working, how big is this place of employment,
11 those specific facts are so narrow, so specific that they will
12 be able to identify a confidential informant as possibly
13 identified by the defense counsel.

14 THE COURT: Well, maybe Mr. Cooper can allay your
15 concerns by narrowing his questions. I think there's a
16 particular -- there's particular testimony that I think we're
17 concerned about, whether the agent's -- he's attacking the
18 credibility of the agent, and maybe we can limit the testimony
19 to that, so I can decide whether we need to have a Franks
20 hearing and whether we need to reopen the motion for summary
21 judgment.

22 Let's see how far it goes. If it gets far afield,
23 you can renew your request, Mr. Martinez, but let's go for a
24 while.

25 Mr. Herrera, if you'll come up and stand next to the

1 witness box before you're seated, Mr. Gonzales will swear you
2 in.

3 MR. GONZALES: State your name for the record.

4 THE WITNESS: Carlos Herrera. H-E-R-R-E-R-A.

5 (Witness sworn.)

6 MR. COOPER: Your Honor, before I begin, may I
7 briefly respond?

8 THE COURT: Sure. Sure.

9 MR. COOPER: Judge, Roviario says this Court is not
10 required -- or is not -- it's not necessary to compel the
11 disclosure of a confidential informant. That's different than
12 the defense going out, doing their investigation, finding out
13 who may have had some information with regard to this issue.

14 All Roviario says is, you can't make them disclose it.
15 And so I would object -- I have no problem with limiting the
16 disclosure and preventing the disclosure of the actual name,
17 but I think it's very important for me to elicit the facts as
18 to where he went, what he did, who he spoke with, and in what
19 capacity that person worked in order to perfect my record in
20 this case.

21 THE COURT: Well, and I -- I tend to agree with you.
22 If you can -- If you can try to -- Since -- You can try to
23 minimize any damage to the confidential informant, and I think
24 everybody would appreciate that, but I tend to agree, you've
25 probably got to do what you've got to do here.

1 All right. Mr. Herrera. Mr. Cooper.

2 MR. COOPER: Thank you, Judge.

3 **DEFENSE WITNESS CARLOS HERRERA,**

4 after having been first duly sworn under oath,

5 was questioned and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. COOPER:

8 Q. Mr. Herrera, how are you employed?

9 A. I'm an investigator with the Federal Public Defender's
10 Office.

11 Q. And how long have you been so employed?

12 A. About three years now.

13 Q. And what are your duties typically as an investigator with
14 the Public Defender's Office?

15 A. I am asked to go out and investigate certain portions of
16 cases, talk to witnesses, look at evidence, evaluate evidence,
17 write reports based on my findings.

18 Q. Now, are you familiar with the case of United States of
19 America versus Richard McKenzie?

20 A. Yes. I was assigned to work that case.

21 Q. Okay. And that was prior to the time when I was appointed
22 to represent Mr. McKenzie; is that correct?

23 A. Yes, sir, that is correct.

24 Q. And who was the lawyer assigned to that case?

25 A. Alonzo Padilla was the attorney.

1 Q. Okay. Did Mr. Padilla ever ask you to do anything in
2 connection with this particular case?

3 A. Yes, sir.

4 Q. And what was the task that was assigned to you?

5 A. I was asked to travel to Flagstaff, Arizona, to
6 investigate the case.

7 Q. Okay. And did you, in fact, do that at some point in
8 time?

9 A. I did. I believe I traveled out there on May 6, 2009.

10 Q. And when you traveled to Flagstaff, was that -- was that
11 2009 or 2010?

12 A. May I refer to my report to refresh my memory?

13 Q. You may.

14 A. I'm sorry, that was 2010.

15 Q. Okay. Thank you.

16 Did you have occasion to interview a witness in
17 Flagstaff, Arizona?

18 A. Yes, I did.

19 Q. And without disclosing his name, would you tell me what
20 you learned from this individual?

21 A. I learned that this individual had been working for Amtrak
22 for approximately 24 to 28 years. At the same time, he was
23 also working with the National Guard as a -- I think at the
24 last duty station was a warrant officer with the National
25 Guard.

1 Q. And did he have any particular training, either with
2 Amtrak or with the Army reserves?

3 A. Yes, he did have particular training with the Army and
4 Amtrak.

5 Q. Can you tell me what sort of training he had?

6 A. Observation techniques. Specifically, he was trained on
7 how to observe individuals for, I guess, any threats that they
8 may or may not be providing.

9 Q. Okay. And his last post in the Army reserves, what did --
10 what was -- what was he doing at that point in time, and what
11 did that particular unit do?

12 A. That particular unit was being trained by himself, as well
13 as to observe I guess what would be enemy insurgents for, I
14 guess, any threats that they may provide.

15 Q. Okay.

16 A. And it was basically just to identify mannerisms, anything
17 regarding their personal appearance or behavior that may or may
18 not pose a threat.

19 Q. Did he tell you what his hours of employment were?

20 A. He works the day shift there at -- in Flagstaff.

21 Q. And did you learn how many people were working the day
22 shift as ticket agents?

23 A. In speaking to him, I was identified that there were two
24 people that work as ticket agents at that particular office.

25 Q. And can you tell me a little more about those two

1 individuals?

2 A. Yes. One individual is a male, and the other individual
3 is a female.

4 Q. Okay. And did he work the day or night shift? I'm sorry.

5 A. The person I talked to worked the day shift.

6 Q. Okay. And was the person a male or a female?

7 A. The person was a male.

8 Q. Did this -- Did this individual talk to you about what he
9 would do in the event that he saw a suspicious person or a
10 suspicious package on the train?

11 A. Yes, he did.

12 Q. And what did he tell you was his normal course of conduct?

13 A. His normal course of conduct in that case was to identify
14 the person or package -- he said it was red flagging it -- and
15 then he would send that information off to an Amtrak police
16 department person by the name of John Claiborne based here in
17 Albuquerque.

18 Q. Okay. Did he ever have any direct contact with other law
19 enforcement officers?

20 A. In the course of my interview, no, he did not have any
21 direct contact with any other law enforcement officers.

22 Q. And would he routinely review the passenger manifests?

23 A. Absolutely. That was part of his job.

24 Q. And what was he looking for?

25 A. Things out of the ordinary. There were certain criteria

1 that he would look at and identify things that were out of the
2 ordinary there and red flag.

3 Q. Was he looking at a drug profile?

4 A. Yes.

5 Q. Did he ever have any training from DEA?

6 A. Yes, I believe he did undergo training through DEA and
7 through Amtrak.

8 Q. Do you know who trained him, who from DEA might have
9 trained him?

10 A. May I look at my report again?

11 Q. You may.

12 Now, if it's not in your report --

13 A. No, it's not in my report. I don't see that.

14 Q. Okay. Now, when he would see something suspicious, what
15 would he do -- how would he transmit that information to
16 Mr. Claiborne?

17 A. He would fax it to Mr. Claiborne.

18 Q. And where was Mr. Claiborne's office located?

19 A. Albuquerque, New Mexico.

20 Q. Was that at the Amtrak station?

21 A. I believe so.

22 Q. Did he talk about when he had most recently sent anything
23 to Mr. Claiborne?

24 A. From the time that I talked to him, his memory was he
25 hadn't sent anything to Claiborne in a year, maybe about a year

1 or so.

2 Q. Okay. Did he ever -- Did he tell you that he had ever had
3 any direct contact with a DEA agent?

4 A. He had never had any contact directly with a DEA agent.

5 Q. Had he ever heard of Agent Hyland?

6 A. He had not heard of Agent Hyland.

7 Q. Did you specifically ask him that?

8 A. I did.

9 Q. Did he ever tell you that he had, in his entire career,
10 ever faxed anything to Agent Hyland?

11 A. He did not know Mr. Hyland, and, to his knowledge, he had
12 never faxed anything directly to Mr. Hyland.

13 Q. What about to the agency itself?

14 A. To the DEA, no. Everything that he faxed was directly to
15 John Claiborne, part of Amtrak.

16 Q. Did you get a sense as to whether he was being truthful to
17 you?

18 A. Oh, yes, I thought he was being very truthful to me.

19 Q. How did -- How did -- Tell me about what he said when you
20 first started talking to him and how he participated in this
21 interview with you.

22 A. When I first spoke to him, he did not want to talk to me
23 about anything. I just basically kept on asking questions
24 regarding some of his techniques that he had used, and he
25 stopped me and clarified some things for me, and that's when we

1 got into our actual interview.

2 Q. Okay. Did he ever hesitate at all when you asked him
3 whether or not he had faxed anything to DEA or to Agent Hyland?

4 A. No, I don't think he hesitated at all. He answered those
5 questions pretty directly at that point in time.

6 Q. And do you think truthfully?

7 A. Yes, I do.

8 MR. COOPER: I have no further questions. I pass
9 this witness, Your Honor.

10 THE COURT: All right. Thank you, Mr. Cooper.

11 Mr. Martinez, do you have cross-examination of
12 Mr. Herrera?

13 CROSS-EXAMINATION

14 BY MR. MARTINEZ:

15 Q. You've referred to your report twice now?

16 A. Yes, sir.

17 Q. May I see your report?

18 A. Please. It's an interoffice memo.

19 MR. MARTINEZ: Your Honor, if I may have a moment to
20 go through the report?

21 THE COURT: You may.

22 Q. (By Mr. Martinez) I assume you wrote this interoffice
23 memo from notes that you took?

24 A. I don't think I actually took notes. That's from my
25 memory.

1 Q. This is from your memory?

2 A. I believe so, yes.

3 Q. And today your memory isn't completely -- you had to refer
4 to your notes a couple times?

5 A. Yes. It's been a while since I actually looked at this.

6 Q. In fact, it's been a long time, hasn't it?

7 A. It has.

8 Q. And so your memory may not be completely clear on certain
9 things, and that's why you referred to this?

10 A. Sure.

11 MR. COOPER: Your Honor --

12 THE COURT: Yes.

13 MR. COOPER: -- my client would like to have his
14 right hand free from his handcuffs so that he may make some
15 notes.

16 THE COURT: His right hand? Any objections from the
17 marshals?

18 U.S. DEPUTY MARSHAL: It's normal policy to keep the
19 cuffs on, unless it's all right with you.

20 THE COURT: It's all right. Why don't you let him
21 use his right hand.

22 THE DEFENDANT: Thank you, Your Honor.

23 THE COURT: Thank you. Appreciate it.

24 MR. COOPER: Thank you, Judge.

25 MR. MARTINEZ: May I proceed, Your Honor?

1 THE COURT: You may, Mr. Martinez.

2 MR. MARTINEZ: May I have this report and write on
3 it?

4 THE COURT: If you need a copy made, I can have
5 Mr. Gonzales make a copy. Do you want a copy?

6 MR. MARTINEZ: May I please, Your Honor?

7 THE COURT: You may.

8 MR. MARTINEZ: Thank you.

9 Your Honor, if I may just have a moment to --

10 THE COURT: You may.

11 Q. (By Mr. Martinez) Mr. Herrera, you just testified that
12 this individual who you're talking about said that he had
13 never heard of the Case Agent Hyland.

14 A. Right.

15 Q. And you also testified that he has never faxed anything
16 specifically to Case Agent Hyland?

17 A. Right.

18 Q. Now, from your testimony this morning, can you say that
19 this person was involved as the confidential informant in this
20 case?

21 A. I do not know.

22 Q. You do not know that?

23 A. No.

24 Q. In fact, you testified that -- Is it fair to say that you
25 wrote in your report that Amtrak has been proactive in

1 observing and reporting suspicious activity on the trains?

2 A. That is in my report.

3 Q. And so is it fair to conclude from that that -- it could
4 have been someone else at Amtrak who was the confidential
5 informant in this case?

6 A. Possibly.

7 Q. And it's in your testimony this morning that there were
8 two individuals that were working at this station?

9 A. Yes, sir.

10 Q. One is this individual that you spoke to?

11 A. Yes, sir.

12 Q. The other one is a female that works there at night; is
13 that right?

14 A. Yes, sir.

15 Q. And you did not speak to a female, did you?

16 A. Did not.

17 Q. So you don't know what she has to say or what she would
18 say to your questions?

19 A. No, I do not.

20 Q. So it could be the female who was the confidential
21 informant?

22 A. It could be.

23 Q. When you went to this place --

24 A. Yes.

25 Q. -- did you know that -- the fax number of DEA?

1 A. No.

2 Q. Did you ask this person you spoke to the fax number that
3 he sent to?

4 A. No, I did not. I just asked for the fax number that he
5 used, himself, to fax information.

6 Q. And you have that?

7 A. Yes, I do.

8 Q. Okay. Where is that in your report?

9 A. It is the very last line on the first page of my report.

10 Q. Okay. So this is his fax number that he faxes from?

11 A. That's what he provided me as the number that he uses to
12 fax information from.

13 Q. But you did not ask him what number he faxed to?

14 A. I did not.

15 Q. And you do not have that information?

16 A. I do not have that information.

17 Q. And you did not have the information of the DEA fax
18 number?

19 A. No.

20 Q. Now, according to your testimony, this individual faxed it
21 to Mr. Claiborne, right?

22 A. Yes, sir.

23 Q. At the Amtrak office?

24 A. Yes. More specifically, I would say the Amtrak police
25 office here in Albuquerque, New Mexico.

1 Q. Now, do you know Mr. Claiborne's position at this time,
2 when the case happened?

3 A. I do not.

4 Q. Do you know whether he was a liaison with the DEA?

5 A. I do not know.

6 Q. Do you know if he was stationed out of the DEA office?

7 A. I do not know.

8 Q. So you don't know whether Mr. Claiborne's -- if
9 Mr. Claiborne officed out of the DEA; is that correct?

10 A. I do not know.

11 Q. So you don't know whether a reference by this individual
12 to the Amtrak police office could actually be Mr. Claiborne
13 stationed at the DEA office?

14 A. Possibly. I don't know.

15 Q. You just don't know?

16 A. No, I do not know.

17 MR. MARTINEZ: Your Honor, may I have a moment?

18 THE COURT: You may.

19 Q. (By Mr. Martinez) Now, isn't it true that this individual
20 also told you that he did not know what the Amtrak police did
21 with this information?

22 A. That's correct.

23 Q. And so you don't know what happened to this information
24 once it was faxed, do you?

25 A. No. All that was told to me was that he faxed information

1 to John Claiborne and John Claiborne took it from there.

2 Q. And when we're talking about this information, in this
3 case we're talking about the PNR; is that correct?

4 A. The PNR, passenger manifest, anything that was being sent
5 through Amtrak, anything that was sent through that, that was
6 suspicious, that was flagged, sent to the Albuquerque Amtrak
7 office to John Claiborne. What Claiborne did after that, he
8 did not know.

9 Q. But you knew that it was faxed to Albuquerque?

10 A. Yes.

11 Q. Someplace in Albuquerque?

12 A. The Amtrak police station, according to the person that I
13 talked to.

14 Q. Now, let me go back to this individual telling you that
15 Amtrak has been proactive in observing or reporting suspicious
16 activity on the trains. He told you that?

17 A. Yes, he did tell me that.

18 Q. And he also -- And he basically told you that because of
19 9/11 the main focus is terrorism; is that right?

20 A. The main focus is terrorism, but with that is any other
21 criminal activity.

22 Q. And that would include people transporting drugs?

23 A. I think that falls into that category, yes.

24 Q. Now, from the way he told you that, was it your sense that
25 that was basically a broad policy for Amtrak?

1 A. Yes.

2 Q. Now, in this case that we're talking about, this is a
3 train coming from Los Angeles; is that correct?

4 A. I believe so.

5 Q. And so there are a number of stops along the way from
6 Los Angeles; is that right?

7 A. I believe so. I've taken that train before, both coming
8 and going, and, yes, there are a number of stops.

9 Q. And Flagstaff is one of these stops?

10 A. Yes, it is.

11 Q. And he told you about himself and another individual that
12 work in Flagstaff. How many ticket agents are there in
13 Flagstaff?

14 A. Two.

15 Q. As far as you know?

16 A. As far as I know, there are two.

17 Q. Could there be more?

18 A. There could be more, but when I asked him how many there
19 were, he said, "I work day shifts; the other person works the
20 night shift."

21 Q. Did you ask if anyone had recently retired?

22 A. No, I did not.

23 Q. Did you ask if anyone had recently died?

24 A. No, I did not.

25 Q. So you don't know if there had been other people working

1 there, either?

2 A. No, I don't.

3 Q. So based upon your follow-up investigation, what
4 information do you have which leads you to conclude that this
5 individual you spoke to was involved in this case?

6 A. This individual's been working that office for 24 to 28
7 years. The only time he's not there is when he's off doing
8 training with Amtrak police or he's on vacation or he's doing
9 his National Guard duties. He said that he's worked the day
10 shift exclusively for that time. The other person works the
11 night shift during that time. I don't know how long the other
12 person had been there, but I do know that the person that
13 Mr. McKenzie dealt with was a male.

14 And he purchased his ticket during the day, if I'm
15 not mistaken.

16 Q. But wouldn't the factors you were told by this individual
17 lead you to conclude that he wasn't involved?

18 A. No. I think this individual was involved.

19 Q. Based upon those factors that you just --

20 A. Yeah.

21 Q. -- articulated?

22 MR. MARTINEZ: Your Honor, may I have a moment?

23 THE COURT: You may.

24 Q. (By Mr. Martinez) Did you show him the PNR involved in
25 this case?

1 A. I did not.

2 Q. Why didn't you?

3 A. I don't know.

4 Q. Did you take the PNR with you to Arizona?

5 A. I don't think I had it at the time. That's just from my
6 thinking. I don't know.

7 Q. And so you did not give this individual a specific chance
8 to identify whether he was involved in this matter?

9 A. No. This individual just showed me what he did there at
10 the Amtrak office. He wouldn't look at anything that I had. I
11 was just able to ask him questions. That was all.

12 MR. MARTINEZ: Your Honor, may we approach?

13 THE COURT: You may.

14 (Bench conference on the record.)

15 MR. MARTINEZ: Your Honor, I just want to alert the
16 Court, I'm having some trouble with my questioning, and now I
17 believe in my -- in my response I want to alert the Court that
18 I think the in camera review may be -- you know, I brought it
19 to the Court's attention that the Court may want to do an
20 in camera review.

21 Here's what I want to alert the Court to. And I
22 don't want to be disingenuous here. On the PNR, I know that --
23 well, what I believe is the person that they spoke to I think
24 his number is on that PNR. You know how we all have ways of
25 identifying ourselves in the system? I believe his number is

1 on the PNR.

2 I also want to be completely candid with the Court,
3 and right now my position with the Court is, I don't know if
4 this person is the confidential informant. I don't know. And
5 I can only tell the Court that I think if the Court would do an
6 in camera review the Court would understand why I'm saying
7 that.

8 MR. COOPER: An in camera review of what?

9 MR. MARTINEZ: Of an agent who could answer these
10 questions. But I guess my reason for approaching today is, I
11 want to be candid with the Court, that I just asked that
12 question of the witness, whether he knew for sure whether this
13 was the person involved in this case, and I'm bringing up the
14 fact that on the PNR I believe the person who he was
15 interviewing, the guy's identifier for the computer system was
16 on the PNR. So I just want to alert the Court to that. I
17 don't want to misrepresent.

18 THE COURT: Well, do you have any thoughts on that
19 Mr. Cooper?

20 MR. COOPER: Well, Your Honor, I think that we know
21 that our client dealt with a male ticket agent; we know that he
22 was employed by -- the individual that Mr. Herrera spoke with
23 was employed by Amtrak during that period of time. We cannot
24 say with absolute certainty that he was the individual,
25 obviously, but I believe that if there are two ticket agents --

1 one's female, one's male -- we understand that he,
2 Mr. McKenzie, dealt with a male -- just by deduction I think it
3 had to have been this individual.

4 If there is -- I think that's why we ought to have a
5 hearing and bring that individual in, have him testify as to
6 whether or not he -- you know, show him that PNR, see if it is
7 his.

8 I think that -- Also, I think Officer -- Agent Hyland
9 has certainly been -- I mean, he said he dealt with a ticket
10 agent, so I don't think there's any question that it's another
11 employee at Amtrak. It had to have been a ticket agent,
12 because that's his testimony throughout the suppression
13 hearing, so I think it had to have been one of two people, and
14 if that person was a male, I think it had to have been him,
15 but --

16 MR. MARTINEZ: I'm sorry.

17 MR. COOPER: -- but I think that, you know, that's
18 certainly a way to find out in an in camera hearing by someone
19 who has information from Amtrak. I mean, I think it has to be
20 an Amtrak agent. Not necessarily a DEA agent.

21 MR. MARTINEZ: Your Honor, let me add to my candor in
22 front of the Court, because I don't want to be disingenuous
23 with my questions. I have reason to believe that there are
24 more than two people, and I think that this in camera could
25 clarify for you the entire issue.

1 I also was concerned in asking questions of this
2 witness, because I believe that the information came from the
3 Flagstaff office, understanding that there's other offices
4 along the line, I believe it came from the Flagstaff office,
5 and I don't want to be disingenuous with that, either. That's
6 why I can't go farther, I think, in asking my questions as far
7 as other possible options of where it came from. But again,
8 I'm tied by the fact that I think that more information that
9 comes out on this will be giving up critical information on how
10 Amtrak gives intelligence.

11 THE COURT: Do you have any problem with me doing an
12 in camera interview? I mean, do I need to interview, or do you
13 want to do it by affidavit, or how do you want --

14 MR. MARTINEZ: Well, Your Honor, I will have -- I
15 should have the agent who I'm thinking about available. He
16 should be here at 10:30. I hope you're aware of the issue with
17 him.

18 THE COURT: Ms. Wild mentioned something about --

19 MR. MARTINEZ: He said he would be here earlier, if
20 possible. But I think this would clarify the entire issue for
21 Your Honor.

22 THE COURT: Well --

23 MR. MARTINEZ: What I was thinking, I could ask a
24 couple questions in camera of the witness.

25 THE COURT: What's your thoughts on that, Mr. Cooper?

1 MR. COOPER: Where is this witness from?

2 MR. MARTINEZ: DEA. Maybe an affidavit -- Maybe an
3 affidavit would be cleaner.

4 MR. COOPER: I would rather he testify in person in
5 front of you in camera than by affidavit, because I think you
6 know the case, you know the issues, and if -- if who we say is
7 not the right person, then --

8 MR. MARTINEZ: Well, I mean, I can't misrepresent --

9 THE COURT: It doesn't look like Mr. Cooper objects
10 to this.

11 MR. COOPER: No.

12 THE COURT: So I'll --

13 MR. COOPER: I don't object to an in camera review of
14 this individual, or probably better still by somebody from
15 Amtrak, because I'm not sure if this guy -- I don't know how he
16 has the information to tell you this number belongs to [REDACTED]
17 [REDACTED] or [REDACTED] or whoever.

18 MR. MARTINEZ: Well, I don't want to misrepresent for
19 Mr. Cooper. It's my thought that we will not be able to
20 determine who the confidential informant is.

21 THE COURT: Well, let's do this. Let's do the
22 in camera review. We'll take his testimony -- I assume this is
23 what we'll do -- correct me if I'm wrong -- is that I'll take
24 the testimony, and this portion of the hearing will be sealed,
25 so it will still be recorded, it will be sealed, so it will be

1 ex parte if it's filed, and so then knowing that you can now
2 figure out what you want to do with Mr. Herrera, whether you
3 want to ask any more questions of him or let him go.

4 MR. MARTINEZ: Well, I don't think I can -- I don't
5 think I can ask any more questions, Your Honor. Again, part of
6 my attempt coming up here, I don't want to mislead the Court or
7 misrepresent. I mean, I think I've told you what -- In other
8 words, it -- I don't want to start asking questions that would
9 lead the Court to think that the confidential informant came
10 from some other office or something when I believe that it
11 actually came from Flagstaff.

12 MR. COOPER: Go ahead. I'm sorry.

13 MR. MARTINEZ: And the fact that -- I mean, I've
14 asked some questions about the one or two individuals that he
15 testified to, but I have information that I believe it's one
16 of -- I think -- I think it could be up to three people
17 involved. I do think it's one of two people. I don't think
18 it's necessarily what he identified.

19 THE COURT: All right. Well, why don't you finish up
20 with him and we'll see where we are, and then we'll plan on
21 taking in camera testimony when he arrives?

22 MR. MARTINEZ: Yes, Your Honor. We're probably about
23 35 minutes away from that.

24 (Open court.)

25 THE COURT: All right. Mr. Martinez.

1 MR. MARTINEZ: Pass the witness, Your Honor.

2 THE COURT: All right. Thank you, Mr. Martinez.

3 Mr. Cooper, do you have redirect of Mr. Herrera?

4 REDIRECT EXAMINATION

5 BY MR. COOPER:

6 Q. It's your testimony that the ticket was picked up that
7 morning at the Flagstaff ticket office?

8 A. I believe so.

9 Q. And it was picked up from a male agent?

10 A. I believe so, yes.

11 Q. When you asked the individual that you interviewed how
12 many agents there were, what was his response?

13 A. Two.

14 Q. And he told you the other individual was a female?

15 A. Yes, sir.

16 Q. And he told you that he did not fax anything to Agent
17 Hyland?

18 A. Right.

19 Q. He didn't know Agent Hyland?

20 A. Right.

21 Q. He didn't fax anything to Agent Hyland --

22 A. Right.

23 Q. -- or to DEA office?

24 A. Right.

25 Q. And that all of his communications were through

1 Mr. Claiborne?

2 A. Yes.

3 Q. At the Amtrak police station?

4 A. Yes, all of his communications were to Mr. Claiborne.

5 Q. But he didn't know what Mr. Claiborne did after receiving
6 those communications?

7 A. That's correct.

8 MR. COOPER: I have no further questions, Your Honor.
9 Thank you.

10 THE COURT: All right. Thank you, Mr. Cooper.

11 Mr. Herrera, you may step down. Thank you for your
12 testimony.

13 THE WITNESS: May I be excused, Your Honor?

14 THE COURT: Is there any reason that Mr. Herrera
15 cannot be excused from the proceedings, Mr. Martinez?

16 MR. MARTINEZ: No, Your Honor.

17 THE COURT: How about you, Mr. Cooper?

18 MR. COOPER: No, Your Honor. Thank you.

19 THE COURT: All right, you're excused from the
20 proceedings. Thank you for your testimony.

21 And you wish now to call Mr. Hyland? Is that what
22 you wish to do?

23 MR. COOPER: I do, Your Honor.

24 THE COURT: What's your thoughts on that,
25 Mr. Martinez?

1 MR. MARTINEZ: Your Honor, if I -- I guess for the
2 limited purpose of determining whether his testimony earlier --
3 because I do believe that there's an issue of credibility
4 concerning Mr. Hyland, and for that limited purpose, Your
5 Honor, I do not object, because I think that needs to be
6 clarified for the Court.

7 Your Honor, if I may take at this time, though, to --
8 I told you I had something I wanted to bring up to the Court
9 earlier.

10 THE COURT: All right.

11 MR. MARTINEZ: In my response, which is document 96,
12 Your Honor, I represented on the bottom of page 3 going into
13 page 4 what the United States believed was the main issue.
14 Specifically, I think I referenced in the first sentence: "and
15 he then obtained the PNR from the DEA fax machine," and then I
16 said later on again in the next sentence "from the DEA fax
17 machine again," and I think I repeated the thought in another
18 sentence coming up on the top of page 4, "that being from the
19 DEA fax machine."

20 Now, in preparing for this hearing, I realize that it
21 was my mistake and I concluded in my mind that that was the
22 issue as far as whether this fax that we're talking about, the
23 PNR, Agent Hyland had taken from the DEA fax machine. The
24 actual testimony at trial -- Agent Hyland's testimony at trial
25 was -- and I'm referring to the transcript from August 20th,

1 2009 -- was that he did not remember whether he took it from
2 the fax machine.

3 MR. COOPER: Page and line, Counsel?

4 MR. MARTINEZ: Oh, I'm sorry. It would be page 75.
5 It's starting --

6 I'm sorry, Your Honor, if I may have a moment to cite
7 specifics?

8 THE COURT: You may.

9 MR. MARTINEZ: Your Honor, for some reason I'm
10 failing to see it right now, but I've marked the page -- Oh,
11 I'm sorry, Your Honor. I cited the wrong transcript. The
12 transcript is actually document 94, the date is February 18,
13 2010, and it's reference page 5. And I think the question was
14 from Mr. Padilla at the bottom of page 5 on this transcript.
15 "And did you specifically take that out of the [fax] machine
16 that morning, if you recall?"

17 I object at the top of page 6. Mr. Padilla states,
18 "If you recall."

19 You overruled my objection, Your Honor.

20 And then: And do you recall whether -- Okay.

21 And then line 3: "I can't recall."

22 So I wrote the -- I wrote my response based upon the
23 fact that I thought the issue was that he took it off the fax
24 machine.

25 Now, from the transcript, he didn't remember. In

1 speaking to Mr. Hyland now, just to be candid with the Court,
2 he now remembers that he didn't take it off the fax machine; he
3 actually took it off an envelope that's tied to the wall there,
4 and that's where he got it from.

5 Now, with that said, the point is still the same,
6 Your Honor. The question is whether the fax was sent to DEA,
7 and I still stand by the fact that the fax was -- the PNR was
8 still sent to the DEA office. I want to correct myself. It
9 was that the agent didn't take it off the fax machine. What he
10 did was he took it from an envelope that was in his office area
11 on the wall.

12 THE COURT: All right.

13 MR. MARTINEZ: And if the Court has any questions of
14 me concerning that --

15 THE COURT: I don't believe I have any at the present
16 time. And are you -- Are you calling Mr. Hyland for the
17 limited purpose that Mr. Martinez mentioned?

18 MR. COOPER: Your Honor, I do want to test his
19 credibility as to how he received it, from whom he received it.
20 He has previously testified he received it from a ticket agent,
21 and I think that goes to the heart of our motion.

22 THE COURT: All right. Well, let's see how it goes.

23 All right, Mr. Hyland, if you'll come up to the
24 witness stand, and before you're seated, Mr. Gonzales will
25 swear you in.

1 MR. GONZALES: Your whole name for the record, please
2 sir.

3 THE WITNESS: Mark D. Hyland. H-Y-L-A-N-D.
4 (Witness sworn.)

5 THE COURT: Mr. Hyland. Mr. Cooper.

6 MR. COOPER: Thank you, Your Honor.
7 Counsel.

8 DEFENSE WITNESS MARK D. HYLAND,
9 after having been first duly sworn under oath,
10 was questioned and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. COOPER:

13 Q. Agent Hyland, it was the Amtrak ticket agent that provided
14 you with the PNR, correct?

15 A. Yes, sir.

16 Q. And Amtrak ticket agents are trained by DEA agents as to
17 what to look for when a passenger comes to their ticket -- to
18 the train station, correct?

19 A. I don't know what that Amtrak ticket agent received from
20 us, if anything.

21 Q. But, generally, ticket agents are trained by DEA agents as
22 to what to look for, are they not?

23 A. They may be.

24 Q. They may be? Do you recall testifying at a motion to
25 suppress hearing on August the 20th, 2009 --

1 A. Yes, sir.

2 Q. -- in this courtroom?

3 A. Yes, sir.

4 Q. And do you recall being asked this question and giving
5 this response?

6 MR. COOPER: Counsel, page 96 of that transcript,
7 line 10.

8 Q. (By Mr. Cooper) "Question: And, sir, to your knowledge,
9 have these individuals met with drug enforcement agents and
10 been provided with the type of information that they should
11 look for before they release the information to Drug
12 Enforcement Administration?"

13 At that point an objection was lodged by
14 Mr. Martinez. It was overruled. And then you answered:
15 "Yes."

16 Do you recall that?

17 A. Yes, sir.

18 Q. Okay. So they are trained by Drug Enforcement
19 Administration agents as to what to look for, are they not?

20 A. Well, they met with DEA agents. I don't know what
21 transpired.

22 Q. At the suppression hearing, you testified that the Amtrak
23 ticket agent, you believe from Arizona, faxed the PNR to you.
24 Right?

25 A. I know that.

1 Q. You know that?

2 A. Yes, sir.

3 Q. Okay. And you say that you did not pull it out of the fax
4 machine yourself, but you pulled it out of an envelope near the
5 fax machine?

6 A. Yes, in my group, in the interdiction group.

7 Q. Who would have pulled it out of the fax machine?

8 A. I have no idea.

9 Q. How many people are in the room where that fax machine is
10 located?

11 A. At that time, the interdiction group would have been about
12 eight agents and task force officers total.

13 Q. And what -- How is -- What's the purpose of that
14 particular envelope that it was put in?

15 A. There were two envelopes. One is labeled for train number
16 4 and one is labeled for train number 3, which is the westbound
17 train.

18 Q. Okay. And how often do you check that envelope?

19 A. Well, if you are going to go to that train you'll go to
20 that envelope daily.

21 Q. You testified that you had no communication with the
22 ticket agent either before or after the PNR was received. Is
23 that correct?

24 A. Correct.

25 Q. And you had no follow-up with the ticket agent to get more

1 information about Mr. McKenzie, correct?

2 A. Correct.

3 Q. Now, did you have any communications with John Claiborne
4 before going to that train station that day?

5 A. No.

6 Q. Are you sure?

7 A. Yes.

8 Q. Do you know if anybody in the drug interdiction group,
9 those eight individuals, had any communications with John
10 Claiborne on that particular day after receiving that PNR?

11 A. I couldn't say.

12 Q. So the best person to ask that question likely would be
13 John Claiborne?

14 A. I don't know, sir.

15 Q. You don't know?

16 Did you have any communications that day after
17 receiving the PNR from any other Amtrak police agents about
18 Mr. McKenzie?

19 A. No.

20 Q. Or task force officers about contact with Mr. McKenzie?

21 A. I'm sorry, could you repeat the question?

22 Q. Did you have --

23 MR. COOPER: Your Honor, at this time I would invoke
24 the rule.

25 THE COURT: All right. The rule will be invoked.

1 What that means is, any witnesses testifying before the Court
2 will need to stay outside of the courtroom until they are
3 called to testify. The witnesses may not discuss with each
4 other their testimony, but they can discuss their testimony
5 with the attorneys.

6 MR. COOPER: Thank you, Judge.

7 Q. (By Mr. Cooper) After receiving the PNR, pulling it out
8 of the envelope, did you have any communications with other
9 task force officers or any other drug interdiction unit agents
10 concerning Mr. McKenzie?

11 A. On that day I was working with task force Officer Stephen
12 Garcia.

13 Q. Okay. And did you have any communications with him after
14 receiving the PNR?

15 A. Well, we went to the number 4 train together. Yes.

16 Q. Did you do any investigative work prior to going to the
17 train with regard to Mr. McKenzie?

18 A. No.

19 Q. Do you know if Agent Garcia had done any?

20 A. I don't believe so.

21 Q. But you're not sure?

22 A. He was with me the whole time there.

23 Q. Did he give you any information that would indicate that
24 he had done any investigative work with regard to Mr. McKenzie?

25 A. No.

1 Q. We have talked about task force police officers and --
2 Strike that.

3 We have talked about Amtrak police officers, and
4 we've also talked about task force officers. Can you tell me
5 what the difference is?

6 A. Task Force Officer John Claiborne is a DEA task force
7 officer on this day in question. He's also -- He's employed by
8 the Amtrak police department, but at this time he's a federal
9 task force officer working in the DEA interdiction group.

10 Q. You say "at this time."

11 A. I meant in 2008.

12 Q. At the time -- Okay. So at that time he was part of the
13 drug interdiction program -- or unit, I should say, of DEA?

14 A. Yes, sir.

15 Q. Was there any other document in that envelope that dealt
16 with Richard McKenzie?

17 A. Just Mr. McKenzie's PNR.

18 Q. Okay. Was there a cover sheet that went along with that
19 PNR?

20 A. No.

21 Q. Now, I believe at the suppression hearing you testified
22 that you personally did not run an NCIC on Mr. McKenzie prior
23 to going to the train station. Is that correct?

24 A. Correct.

25 Q. Do you know if anybody else did?

1 A. No.

2 Q. That's not the only method of obtaining one's criminal
3 history, is it?

4 A. I don't understand the question.

5 Q. You're a DEA agent, correct?

6 A. Yes, sir.

7 Q. And how long have you been so employed?

8 A. At that time I was in my twenty-first year.

9 Q. And a good part of every day you investigate people who
10 are accused of dealing drugs, correct?

11 A. Yes, sir.

12 Q. Okay. And during the course of that investigation you
13 don't always have an identifier of an individual, do you?

14 A. Correct.

15 Q. Okay. Like today, if you wanted to investigate me, you
16 know my name, Robert Cooper, but you don't know my date of
17 birth, do you?

18 A. No.

19 Q. You don't have my Social Security number, do you?

20 A. No, sir.

21 Q. But there are ways for you to find those identifiers, are
22 there not?

23 A. I believe so, yes.

24 Q. Okay. And you know some of those ways?

25 A. I've used them a few times. Yes.

1 Q. Okay. And you know that there are ways to find one's
2 criminal history other than use of the NCIC, correct?

3 A. That's the most common way I use it.

4 Q. Okay. But there are other ways? If you don't have an
5 identifier, can you find somebody's criminal history?

6 A. It could be done.

7 Q. Okay. Do you know if that was done prior to going to the
8 train station to visit with Mr. McKenzie?

9 A. There wasn't time.

10 Q. Okay. What time did you receive the fax?

11 A. Well, I went to the envelope on the wall after noon, maybe
12 12:20.

13 Q. Now, DEA has a liaison with Amtrak, correct?

14 A. We have Amtrak police officers assigned to our task
15 forces.

16 Q. Okay. And that, again, is John Claiborne?

17 A. Correct.

18 Q. Or was at that time. Where is John Claiborne today?

19 A. He's still working in Albuquerque, New Mexico.

20 Q. In what capacity?

21 MR. MARTINEZ: Objection, Your Honor. Irrelevant.

22 MR. COOPER: Your Honor, I think it may lead to
23 relevant evidence.

24 THE COURT: Well, let's limit it to -- I'll sustain
25 the objection.

1 MR. COOPER: Thank you, Judge.

2 Q. (By Mr. Cooper) Now, you say that you did not receive the
3 PNR from that task force officer, the officer assigned to --
4 or the Amtrak police officer John Claiborne, correct?

5 A. Correct.

6 Q. He did not fax that to you?

7 A. I don't know who. You know, it was in the -- in the
8 envelope.

9 Q. But you testified --

10 A. -- on the wall.

11 Q. -- at the suppression hearing that the information was
12 received from a confidential informant, correct?

13 A. Yes. Yes, sir.

14 Q. And you had previously stated that that confidential
15 informant was a ticket agent, correct?

16 A. Yes, sir.

17 Q. So it necessarily could not have been John Claiborne,
18 because he's not a ticket agent, right?

19 A. Correct.

20 MR. COOPER: May I have a moment, Your Honor?

21 THE COURT: You may.

22 MR. COOPER: Your Honor, I have no further
23 witnesses -- no further questions. Thank you.

24 THE COURT: All right. Thank you, Mr. Cooper.

25 Mr. Martinez, do you have cross-examination of

1 Mr. Hyland?

2 MR. MARTINEZ: Yes, Your Honor.

3 THE COURT: Mr. Martinez.

4 CROSS-EXAMINATION

5 BY MR. MARTINEZ:

6 Q. One of the first questions you were asked by defense
7 counsel was -- and you answered "Yes," I believe -- "Was the
8 PNR faxed to you," and you answered "Yes"; is that correct?

9 A. Yes.

10 Q. Now, could you clarify "to you"? Were you answering
11 specifically to you, or was it faxed to the DEA office?

12 A. It was faxed to the group one interdiction fax.

13 Q. So when you were answering the question, it faxed to you,
14 you meant, actually, this group one interdiction group?

15 A. Correct.

16 Q. Now, you heard me clarify for the Court here that you
17 originally testified that you don't remember if you took it off
18 the fax or not?

19 A. Yes, sir.

20 Q. Now you remember that you took it from this envelope?

21 A. Yes.

22 Q. And could you please describe for the judge what this room
23 is like, and specifically put in context the fax machine and
24 the envelope and what it looks like, if you can give a
25 description?

1 A. Sure. It's maybe a thousand-square-foot room. There's
2 about -- Like I said before, there's about eight officers and
3 agents assigned to this interdiction group at the time, so
4 there's about maybe no more than eight or ten desks. On the
5 east side wall are the two -- are two plastic bins that we've
6 been referring to as envelopes. One is marked train number 4;
7 the other one is marked train number 3. They were there before
8 I got into interdiction in the fall of 2000. And our fax
9 machine would be located in about the center part of the group,
10 maybe 25 feet from that wall.

11 Q. Now, in one of your responses to defense counsel's
12 question, you stated that there wasn't time, and I believe this
13 was in reference to running an NCIC check or something like
14 that.

15 A. Yes, sir.

16 Q. Now, are you part of the interdiction group now?

17 A. No, sir.

18 Q. So you've changed groups?

19 A. Yes.

20 Q. Now, on this date, do you specifically remember what you
21 did on this date?

22 A. Yes.

23 Q. Okay. Can you just give the Court a general description
24 of what you did that morning, just a nutshell description,
25 please?

1 A. Well, every morning there's an earlier Greyhound bus
2 that's eastbound, and I don't report to the office, I go
3 directly to the Greyhound station, and depending upon whether
4 the bus is on time or maintenance issues with the bus, Officer
5 Garcia and I met at the Greyhound bus station, like we had done
6 on prior days, and we worked the Greyhound eastbound bus. We
7 don't get back to the Albuquerque office until about 12:15.
8 And then I go to the envelope, and that's when I see
9 Mr. McKenzie's PNR for the first time.

10 Q. And that's what you did in this case?

11 A. Yes.

12 Q. Now, you were asked whether there was a sheet attached to
13 the PNR. Could there have been a cover page attached to this
14 PNR?

15 A. I very seldom saw a cover sheet in these envelopes -- or
16 in the plastic bin.

17 Q. Do you remember whether or not there was a cover sheet in
18 this case?

19 A. No, there was no cover sheet.

20 Q. There was just a PNR?

21 A. Correct.

22 Q. Now, let me get to the heart of the question here. The
23 allegation is that this PNR was picked up someplace other than
24 a DEA office. On the date in question, did you go to the
25 Amtrak office to pick up the PNR?

1 A. No.

2 Q. Now, when I say "the Amtrak office," is there an Amtrak
3 office in Albuquerque?

4 A. Yes.

5 Q. Okay. Is that at the train station?

6 A. Yes, sir.

7 Q. Okay. Did you go to the Amtrak office at the train
8 station to pick up the PNR?

9 A. No, sir.

10 Q. You picked it up from the DEA office?

11 A. Yes, sir.

12 Q. From the envelope that you've testified to?

13 A. Yes.

14 Q. Let me also be very clear and try to clarify this for the
15 Court.

16 Once you picked up the PNR from that envelope and
17 when you were going to the train station, did you have any
18 other information concerning Mr. McKenzie when you went to the
19 train station?

20 A. No, sir.

21 Q. So you went to the train station based upon your
22 information from the PNR?

23 A. Yes.

24 MR. MARTINEZ: Pass the witness, Your Honor.

25 THE COURT: All right. Thank you, Mr. Martinez.

1 Mr. Cooper, do you have redirect of Mr. Hyland?

2 MR. COOPER: I have no further questions, Your Honor.
3 Thank you.

4 THE COURT: All right. Thank you, Mr. Cooper.

5 All right, Mr. Hyland, you may step down. Thank you
6 for your testimony.

7 All right. Mr. Cooper, do you have further witnesses
8 or evidence you wish to present on your motion?

9 MR. COOPER: I don't, Your Honor.

10 THE COURT: All right. Thank you, Mr. Cooper.

11 Mr. Martinez, do you have witnesses or evidence you
12 wish to present in opposition to the motion?

13 MR. MARTINEZ: Only what we discussed at the bench,
14 Your Honor.

15 THE COURT: All right. Well, why don't -- Why don't
16 we do this? Why don't I have Mr. Cooper and Mr. McKenzie
17 excused from the courtroom, and then we'll bring you back in at
18 the appropriate time.

19 MR. COOPER: Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Cooper.

21 (Mr. Cooper and Mr. McKenzie left the courtroom.)

22 (Portion of transcript under seal.)

23 (Court stood in recess at 10:37 a.m. and resumed at
24 10:50 a.m. as follows, in open court:)

25 THE COURT: Why don't I see counsel up here at bench.

1 (Bench conference on the record.)

2 THE COURT: When we were up here at the bench, you
3 mentioned [REDACTED] and [REDACTED]. Do we need to do anything
4 with those names, or at this point is it all right that those
5 be unredacted here at the bench conference?

6 MR. COOPER: I don't mind -- [REDACTED] was just a
7 fictitious name, and Chester I don't mind redacting.

8 THE COURT: We did it earlier in the case. I'll tell
9 Ms. Schutte Everett to redact those two names.

10 MR. MARTINEZ: Okay. Thank you, Your Honor.

11 (Open court.)

12 THE COURT: All right. Mr. Martinez, does the United
13 States have further evidence it wishes to present in opposition
14 to Mr. McKenzie's motion?

15 MR. MARTINEZ: Nothing further, Your Honor.

16 THE COURT: All right. Thank you, Mr. Martinez.
17 Anything further, Mr. Cooper, on -- evidentiarywise?

18 MR. COOPER: Just a moment, Your Honor.

19 THE COURT: You may.

20 MR. COOPER: Just a moment, Your Honor.

21 THE COURT: Certainly.

22 MR. COOPER: My apologies, Your Honor. I had not
23 intended to do this.

24 THE COURT: That's fine.

25 MR. COOPER: Your Honor, at this time, I would move

1 the admission of Defendant's Exhibit A for identification
2 purposes, and Defendant's Exhibit B.

3 THE COURT: All right. Any objection, Mr. Martinez?

4 MR. MARTINEZ: Your Honor, no objection to A. And --
5 I'm sorry. No objection to B, but I think that A is
6 irrelevant, because I think it's after the fact and it concerns
7 a different group in the DEA organization.

8 THE COURT: All right. Well --

9 MR. COOPER: And, Your Honor --

10 THE COURT: If it just goes to relevance, let me go
11 ahead and accept both of them, and then I'll make a
12 determination as to the materiality.

13 MR. COOPER: Thank you, Your Honor.

14 THE COURT: So Defendant's Exhibits A and B will be
15 admitted into evidence.

16 MR. COOPER: May I approach?

17 (Defendant's Exhibits A and B admitted into evidence.)

18 THE COURT: All right. Any further evidentiary
19 support for your motion that you wish to present today,
20 Mr. Cooper?

21 MR. COOPER: No, Your Honor, nothing else. Thank
22 you.

23 THE COURT: All right. If you wish now to argue in
24 support of your motion.

25 MR. COOPER: If I may, Judge?

1 THE COURT: You may.

2 MR. COOPER: Judge, the motion initially was prepared
3 by prior counsel, and in that there was an allegation that
4 perhaps a Franks hearing should be held due to the false
5 statement that was contained in the affidavit for the search
6 warrant that was presented to Judge Torgerson. There's one
7 statement in there that says that the ticket was purchased the
8 day of travel. That is false. The agent so testified in the
9 motion to suppress hearing, I believe at the August motion
10 hearing.

11 Judge, my client would like you to conduct a Franks
12 hearing with regard to that to determine whether or not that
13 statement was, indeed, false, whether the agent knew it to be
14 so, and then whether or not there was probable cause that
15 existed after you excise that false statement. So just kind of
16 as a housecleaning matter, that's -- that's one part of the
17 motion that had previously been filed, and my client wanted me
18 to argue that.

19 Judge, with regard to the motion -- or the portion of
20 the motion to reopen the suppression hearing and/or have a
21 Franks hearing with regard to the false statements by Agent
22 Hyland, today we testified -- or we brought forth evidence from
23 Mr. Herrera, who testified that he interviewed the ticket
24 agent; that the ticket agent in question never faxed anything
25 to the DEA agents or to Agent Hyland in particular. He said he

1 always faxed any information that he had to the Amtrak police.

2 This agent was a male who worked the day shift. The
3 other agent working the Flagstaff office, according to
4 Mr. Herrera, based on information he learned from the ticket
5 agent, was a female agent who worked the night shift.

6 So it's clear that, based on what we learned during
7 the course of that interview, that that ticket agent never
8 faxed anything to DEA or to Agent Hyland. Agent Hyland, at the
9 hearings on the motion to suppress and today again testified
10 that the PNR came from the ticket agent. He specifically said
11 it did not come from the Amtrak police, it did not come from
12 Claiborne, it came from the ticket agent, who he believed to be
13 in Flagstaff.

14 And, finally, Your Honor, the PNR that's in evidence
15 in the motion to suppress that was interviewed -- I mean,
16 introduced into evidence in the August hearing -- and the
17 exhibit number escapes me, but that PNR is in evidence; that
18 PNR has no fax numbers contained on it, Judge. There's no
19 indication that that document ever came through a fax machine.

20 Today I introduced Exhibits A and B. Those are two
21 documents, Your Honor, that were faxed to DEA. One document is
22 from a phone company, and you'll note that on that document
23 there is indication that the document was faxed to DEA.

24 On the other document, that is a -- that's the
25 motion -- or the affidavit for the motion to suppress, Judge,

1 that, too, indicates that that machine -- that fax came through
2 a fax machine. Those two documents are normally what we see
3 when we see a document that has been received by fax.

4 In the case of the PNR, there is no such entry,
5 there's nothing on the top or the bottom of that exhibit to
6 indicate that that document was ever received by anybody at
7 DEA. So I don't know how Agent Hyland ever received that. We
8 have some idea, and I think, based on that, what we would like
9 for this Court to do is order that we have a Franks hearing, we
10 have a hearing to reopen the motion to suppress to bring forth
11 the Amtrak ticket agent that was interviewed by Mr. Herrera;
12 that we bring forth John Claiborne to testify as to whether or
13 not he received it, because we know from the testimony here
14 today and in the suppression hearing that the Amtrak ticket
15 agent that we talked to said he never sent it by fax to DEA.

16 We also know that Agent Hyland said it never came
17 from Amtrak police or from John Claiborne, but it came from a
18 ticket agent.

19 Somebody's lying, Judge. And I think that goes to --
20 those are issues that need to be resolved by this Court in
21 determining whether or not your initial decision concerning the
22 suppression -- concerning the -- whether or not this is an
23 investigative detention or a consensual encounter. I think
24 those are factors that you should take into consideration, the
25 veracity, the truthfulness of Agent Hyland with regard to how

1 he received this, and then you make a determination as to
2 whether or not it was, indeed, an investigative detention or a
3 consensual encounter.

4 Thank you, Judge.

5 THE COURT: All right. Thank you, Mr. Cooper.

6 Mr. Martinez, if you wish to argue in opposition to
7 this motion.

8 MR. MARTINEZ: Yes, I do, yes.

9 Your Honor, before I forget, I just want to address
10 something that Mr. Cooper brought you that, to my memory, was
11 not brought up as a question or as an answer during any of the
12 hearings. Mr. Cooper's making reference to Government's
13 Exhibit 3, which is the PNR, specifically what's not at the
14 top. In just speaking to the case agent, I would proffer to
15 the Court that the case agent would testify that he removed it
16 for discovery purposes, and he has memory of doing that, and he
17 did that to keep the issue of the confidential informant quiet.

18 So this is a new issue, I think, that came up, I
19 think, with the defendant's exhibits. And, again, I'm
20 proffering to the Court what our knowledge of the top of the
21 page looked like and what happened to that information on it.
22 And it's my understanding that the information did show that it
23 was from Amtrak.

24 MR. HYLAND: Yes, sir.

25 MR. MARTINEZ: Now, Your Honor, the way that I can --

1 or, actually, let me stop there.

2 Does the Court have any questions it's concerned
3 with?

4 THE COURT: Well, what this -- Defendant's Exhibit B,
5 who are these people and what is this exhibit?

6 MR. MARTINEZ: My sense, Your Honor, I should let the
7 defense counsel answer that question.

8 MR. COOPER: Your Honor, I believe that to be the
9 T-Mobile -- it's a fax that was received by DEA pursuant to
10 subpoena of my client's phone records, and today before I
11 introduced this document Agent Hyland confirmed that, indeed,
12 was the phone number -- a DEA fax number. And same with the
13 other exhibit, Your Honor. One is in the unit he's in now; one
14 is in the unit that he was in on the date in question.

15 THE COURT: All right.

16 MR. MARTINEZ: And just for clarification, Your
17 Honor, I believe Defendant's Exhibit 2 concerns group one, and
18 that was the fax that existed at the time of this case.

19 THE COURT: All right.

20 MR. MARTINEZ: Your Honor, the response that the
21 United States gave the Court to the defendant's motion, the way
22 that I'm looking at it is two part. The first is very serious,
23 because an officer of the court has alleged that there was a
24 lie by the case agent at the suppression hearing, and I ask the
25 Court to consider that issue specifically, because right now

1 with that allegation there -- there's a cloud over this case
2 agent's head.

3 The second part that I was asking the Court to
4 consider was then -- if the Franks hearing or the suppression
5 hearing should be reopened.

6 The testimony has been consistent throughout the
7 suppression hearing and again today, that the PNR was faxed to
8 the DEA, Your Honor, and this agent has been consistent, that
9 he received and picked up that PNR there at the DEA office.
10 And we stand by that, Your Honor.

11 THE COURT: I'll have to go back and look at the
12 testimony, but, I mean, is it possible that the -- that the --
13 that material -- I mean, he picks up the fax out of the
14 envelope and doesn't really care that much where it comes from,
15 whether it comes through the Amtrak police department or it
16 comes directly from someone else. Is his testimony -- Is
17 Mr. Hyland's testimony consistent that he knows it came
18 directly from the ticket people?

19 MR. MARTINEZ: Yes, Your Honor, I think that's clear.

20 THE COURT: Okay.

21 MR. MARTINEZ: And the spirit of his testimony, both
22 today and past days, is that this PNR was faxed by this
23 confidential informant to the DEA office, the DEA received it
24 there, somebody took that off the fax machine, put it into one
25 of these two envelopes, for either train three or four, and

1 then -- in this case, I believe it was train 3 -- and that is
2 where Agent Hyland then recovered the PNR, or took it from, was
3 that envelope on the wall.

4 So that's the main point of the testimony concerning
5 that issue, Your Honor, from the Government's perspective.

6 So, with the information that the Court had before, I
7 think that it's clear that this agent has testified truthfully
8 and that this cloud -- or this allegation that's been made
9 towards his testimony is not -- is not correct, it's just not
10 right.

11 And I'm not even going to go into the credibility of
12 this individual, this person who they're alleging is the
13 confidential informant.

14 Looking at the second issue, Your Honor, the main
15 issue that this Court has already dealt with is the Fourth
16 Amendment issue, and the Court, in making its determination, it
17 revolved around the issue of whether this was an investigative
18 stop or a consensual encounter, and this Court has already
19 ruled that it was a consensual encounter, and there's no reason
20 to backtrack on that decision.

21 Now, with that as the premise or the Rosetta stone,
22 then, whether the PNR was faxed to the DEA office is not
23 relevant or material to a consensual encounter at the train
24 station. So for that reason the suppression issue --
25 suppression hearing should not be reopened.

1 Now, concerning the Franks hearing, under Franks
2 there's a three-prong test, and none of the prongs are
3 satisfied in this case, Your Honor.

4 In the motion, they don't -- defense counsel does not
5 even argue a misstatement in the affidavit itself. He's
6 arguing something that is coming about as a result of the
7 hearing. Now that's changing. Defense counsel, today, is
8 talking about the date that this agent testified to in the
9 affidavit. This agent testified in front of you that that was
10 inaccurate and that was a mistake, and that was a simple
11 mistake, Your Honor. And I would argue that the case law, that
12 I'm sure this Court is very familiar with, in this circuit
13 shows that an agent who's writing a search warrant is sometimes
14 caught up in the heat of the moment and not everything is
15 correct, but they look at the spirit of what that agent was
16 doing, whether he was trying to intentionally mislead or not.
17 In this case, it's clear that this agent was not intentionally
18 trying to mislead in the affidavit.

19 And looking at the second prong, again, he did not
20 knowingly and intentionally write the wrong date in there. He
21 did write the wrong date, but it wasn't knowingly or
22 intentionally. And then, obviously, that one error would not
23 have been -- that it would not have changed the PC finding
24 within that search warrant itself, Your Honor, based upon the
25 other facts of the case.

1 And this Court is very well aware of the facts that
2 occurred, and I would just bring out a few of the facts that
3 the Court had to look -- in the search warrant. Some of those
4 facts were the consensual encounter at the beginning, the fact
5 that happened in the stateroom itself with the cereal boxes,
6 what the agents' observations were in that stateroom; the -- I
7 think it's stated in the affidavit his resistance to being
8 arrested and then his fleeing. So those would be issues that
9 the Court would look at.

10 Your Honor, based upon the facts that this Court has
11 before it, the United States asks that it deny a Franks
12 hearing, it deny a reopening of the hearing, and, clearly, the
13 cloud that's been placed over this agent's head.

14 And I stand before you ready to answer any questions
15 you may have.

16 THE COURT: I don't believe I have any of you at the
17 present time. Thank you, Mr. Martinez.

18 MR. MARTINEZ: Thank you, Your Honor.

19 THE COURT: Mr. Cooper, I'll give you the last word
20 on this motion.

21 Let me ask you while you're getting your papers
22 there, if you were to have a Franks hearing, just putting it
23 aside separately, what would be presented to the Court that's
24 different than what -- either different or additional to what
25 we've already done today and the prior two hearings?

1 MR. COOPER: Your Honor, I think the live testimony
2 of the agent from Flagstaff, I think, would --

3 THE COURT: That's the only thing that would be
4 additional?

5 MR. COOPER: That would be additional, and I think at
6 that point --

7 THE COURT: How would that go, then, to the statement
8 that you've identified as incorrect in the affidavit for the
9 search warrant? How would the -- How would anybody from
10 Flagstaff shed any light on that? We know it's incorrect.

11 MR. COOPER: Your Honor, I did not prepare that
12 motion, and that motion --

13 THE COURT: All right.

14 MR. COOPER: -- I think melds a couple of -- probably
15 three different requests of the Court.

16 THE COURT: Let me move you, then, to the motion to
17 suppress.

18 MR. COOPER: Okay.

19 THE COURT: Would your answer be the same, that you
20 would -- the one thing that would be additional would be the
21 agent from Flagstaff?

22 MR. COOPER: Yes, Your Honor. That, and probably
23 Agent Claiborne. I think he is necessary to -- I think his
24 testimony would shed some light on whether or not the agent in
25 Flagstaff is telling the truth or whether or not Agent Hyland

1 is telling the truth, because, clearly, we have two different
2 versions. The agent in Flagstaff is saying that he sent it to
3 the Amtrak police station and never had any dealings with DEA.
4 Agent Hyland said it did not come from Amtrak police, it did
5 not come Claiborne, it came from Flagstaff station agent.

6 THE COURT: So those would be the two additional
7 witnesses?

8 MR. COOPER: Yes, Your Honor. And they go -- And
9 then I think the Court needs to make that -- it's a Franks-like
10 analysis in terms of --

11 THE COURT: It's the credibility issue?

12 MR. COOPER: The credibility evaluation, Your Honor.
13 I think that's what, perhaps --

14 THE COURT: I think Mr. McKenzie wants to speak to
15 you.

16 MR. COOPER: No doubt. Thank you.

17 But those are -- That's how it would change, Your
18 Honor. But in terms of the true Franks hearing, I wouldn't
19 bring any evidence. I think you've already heard the evidence,
20 and the evidence is that a mistake was made, and so I don't
21 think there will be any need for an evidentiary hearing, but,
22 perhaps, argument that what's left is not probable cause,
23 but -- and Mr. McKenzie, I know, wants us to advance that
24 argument.

25 THE COURT: All right.

1 MR. COOPER: May I have just a moment, Your Honor?

2 THE COURT: You may.

3 (A conference was held between the defendant and
4 Mr. Cooper.)

5 MR. COOPER: Judge, back to the Franks hearing with
6 regard to the affidavit. Franks also directs us to look at
7 omissions from the affidavit in addition to willful
8 misstatements, and we would bring forth argument, anyway, and
9 perhaps some testimony from Agent Hyland as to what he knew
10 about the PNR, how he had received it. I think Mr. McKenzie
11 would ask that we advance those arguments, elicit that
12 testimony, advance those arguments.

13 THE COURT: All right.

14 MR. COOPER: Beyond that, I don't have anything else.
15 If the Court has any further --

16 THE COURT: I don't believe so. I think I have what
17 I need. All right. Thank you, Mr. Cooper.

18 MR. COOPER: Thank you, Judge.

19 THE COURT: All right. I'll take this under
20 advisement and try to get you an opinion and order out as soon
21 as possible. We've had this case around for a while, so I'll
22 try to -- now that I have this hearing and the information that
23 it's provided, I'll try to get something to you as soon as
24 possible.

25 MR. COOPER: Your Honor?

1 THE COURT: Yes.

2 MR. COOPER: Mr. McKenzie has informed me that I did
3 not convey to you what he had told me about that particular
4 last issue, and I think he would like to address the Court.

5 THE COURT: I'm sorry, what happened?

6 MR. COOPER: When I -- When I took a moment and
7 talked to Mr. McKenzie and then went back up and told you
8 that's what he wanted me to convey to you, apparently I did not
9 do so correctly.

10 THE COURT: Oh, okay.

11 MR. COOPER: And I think he would like to address the
12 Court.

13 THE COURT: All right. You can do it from there,
14 Mr. McKenzie.

15 THE DEFENDANT: What I wanted to say about the reason
16 to --

17 MS. SCHUTTE EVERETT: I'm sorry. Can you put the
18 microphone --

19 THE COURT: Pull the microphone right over here, just
20 get it close to you.

21 THE DEFENDANT: Thank you, Your Honor.

22 The reason why I asked for a Franks hearing is
23 because if you look at the affidavit and the Complaint and the
24 motion leading up to the hearings, there's no indication
25 anywhere that there is an informant, in that the term they use

1 is "reviewed by Amtrak reservation," that on -- before the
2 arrival of Amtrak train, affiant, which is the officer,
3 reviewed the Amtrak reservation. There's no terms like "upon
4 receipt of information from" or -- he didn't even have to
5 mention the informant's name. You could say CI1, 2 and 3,
6 whatever the case may be. Nowhere does it even invoke that he
7 had -- he got the information from an informant or from
8 somebody else.

9 So the reason why I wanted a Franks hearing is
10 because, if you take away the first part of this, which is how
11 he got the information, that's what I'm trying to argue. How
12 did you receive this information if you're not saying that it
13 was given to you by somebody else? And that's why -- That's
14 what I mean by there's omission. Because how later on down the
15 line, 14 months later you can invoke a informant, where -- I
16 believe that I wasn't properly prepared nor was I allowed to
17 properly prepare, because nowhere does it indicate that he got
18 the information from somebody else, but he's making it seem
19 like he's reviewing. And my argument is, how are you reviewing
20 it? How did you get this paperwork?

21 THE COURT: All right. I understand the point. I
22 will address that in the opinion and order.

23 MR. COOPER: Thank you, Your Honor.

24 THE COURT: All right. Is there anything else we
25 need to discuss while we're together? Anything else I can do

1 for you?

2 Mr. Martinez?

3 MR. MARTINEZ: No, Your Honor.

4 THE COURT: Mr. Cooper?

5 MR. COOPER: No, Your Honor. Thank you.

6 THE COURT: All right. Thank you for your
7 presentations this morning. I have another proceeding, so I'm
8 just going to stay on the bench. Y'all have a good day.

9 MR. MARTINEZ: May we be excused, Your Honor?

10 THE COURT: You may. Y'all have a good day.

11 (Court stood in recess at 11:23 a.m.)

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I N D E X

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1 C-E-R-T-I-F-I-C-A-T E

2 UNITED STATES OF AMERICA

3 DISTRICT OF NEW MEXICO

4

5 I, Danna Schutte Everett, RPR, CCR, CRR, Official
6 Court Reporter for the State of New Mexico, do hereby
7 certify that the foregoing pages constitute a true
8 transcript of proceedings had before the said Court held
9 in the City of Albuquerque, New Mexico, in the matter
10 therein stated.

11 In testimony whereof, I have hereunto set my hand on
12 this 19th day of January, 2011.

13

14

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